Second Civil Number B192627

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NORMAN K. MORROW

Plaintiff and Appellant

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT,
ROY ROMER and ROWENA LAGROSA

Defendants and Respondents

Appeal from the Superior Court for Los Angeles County
Honorable Susan Bryant-Deason, Judge
(Case Number BC349335)

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondents' brief fails to address some of the most important issues presented by this case.[1] Respondents never explain how the personal retirement plans of a public employee relate to school violence, or how disclosing the confidential details of a personnel decision contributes to the discussion regarding school violence.

The events at Thomas Jefferson High School ("Jefferson") were no excuse for Respondent Roy Romer ("Romer") to reveal Appellant's personal retirement plans and the alleged reasons behind his removal to a newspaper reporter. These matters had nothing to do with the events at Jefferson, and Romer knew that private personnel matters were not a proper subject of public discussion. He later apologized to Appellant for releasing confidential information. (RJN Exh. 2, p.7, ll.23-28.)[2]

A school district superintendent is held to a different standard than members of the public when addressing the personnel matters of public

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[1] Unfortunately, Respondents' counsel frequently seem more concerned with discussing their personal opinion of Appellant and his arguments, rather than addressing the legal issues of the case. (*See* Respondents' Brief at pp. 11, 20, 21, 23, 27, 29 n. 9, 33, 37, 41, 43.) The personal opinion of Respondents' counsel is irrelevant, and has no bearing on how the law applies to these facts. This Court, not Respondents' counsel, will decide the case.

[2] Appellant's Request for Judicial Notice, filed with this Court on December 18, 2006 is referred to herein as "RJN."

employees. When Romer told the *Los Angeles Times* that Appellant "had retirement plans that did not fit with the District's needs," and that Appellant's handling of the April and May 2005 disturbances had "accelerated" a decision to replace him (CT 46, 48)[3], he spoke as Appellant's employer, giving the official position of LAUSD regarding these matters. The statements implied assertions of false objective fact, which damaged Appellant's personal and professional life. The law does not protect such statements.

The cloak of "public interest" offers no protection for Romer's defamatory remarks. A public employer may not use confidential employee information to criticize public employees in public. While violence in public schools is a matter of public interest, the details of a school principal's retirement plans and alleged reasons behind his removal are not.

Romer's statements crossed the line from reporting what "steps LAUSD was taking" with regard to school violence, to revealing sensitive, confidential information protected by well-settled authority guaranteeing public employees the right of privacy.

Respondents fail to explain why LAUSD did not follow its own constitutionally mandated procedures for handling personnel matters. (CT

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[3] The Clerk's Transcript is referred to herein as "CT."

345, ll.19-22.) Respondents allege that Appellant was removed from his position because he was "not providing strong leadership," i.e. that he was incompetent and/or not doing his job properly. (CT 85 ¶ 3; CT 87 ¶ 3, ll.21-22.) But Respondents fail to show that Appellant was provided with the notice and due process required by law. Instead, Romer's "opinions" of Appellant were relayed to the public as **fact** in a humiliating, embarrassing and defamatory fashion on the front page of the *Los Angeles Times*.

Respondents also fail to explain how Appellant "appeared powerless" to "stem the tide of violence" at Jefferson. (RB 1.)[4] Appellant repeatedly requested more staff, security, and resources to deal with escalating problems at Jefferson before the violence occurred. (CT 344, ll.23-28; CT 345, ll.12-18.) District officials, including Lagrosa and Romer, ignored Appellant's repeated requests for help. (*Id.*) After the disturbances, Appellant instituted policies aimed at stemming the violence, including banning heavy belt buckles and white T-shirts. (SCT 12.)[5]

Appellant could not have added more security, police or other staff to the Jefferson campus himself because he was not authorized to appoint District personnel. (CT 8.) Appellant was an employee of the LAUSD who

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[4] Respondent's Brief is referred to herein as "RB."

[5] The Supplemental Clerk's Transcript is referred to herein as "SCT."

served under a chain of command consisting of his Director, the local District Superintendent, the District Superintendent, and the Board of Education. (AOB 53.)[6]

The problem of school violence went far beyond Jefferson and its principal. It was a product of LAUSD's systemic inadequacy and racial tension in the surrounding community. (SCT 4, 21.) Respondents did not mention that disturbances like those at Jefferson occurred at several LAUSD campuses in 2005. (SCT 20.) Two separate fights occurred at Los Angeles High School on the same day as one of the disturbances at Jefferson. (SCT 16.) Respondents also failed to mention that the fights were racially motivated, which was recognized by community leaders and participants. (SCT 3, 10, 24.) The racial overtones of the student disturbances were unrelated to Respondents' statements. (*Id.*)

Not until after the events at Jefferson did LAUSD respond by doing many of the things Appellant requested, including increasing campus staff, increasing security and providing additional resources to deal with overcrowding. (SCT 21.) Respondents, who had the power to address the problems, simply blamed Appellant for the disturbances to deflect blame from themselves. (AOB 2.)

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[6] Appellant's Opening Brief is referred to herein as "AOB."

The facts presented to the trial court support the validity of both the First and Sixth causes of action, and the order granting Respondents' special motion to strike should be reversed.[7]

ARGUMENT

I. APPELLANT HAS MET THE BURDEN OF PROOF REQUIRED TO DEFEAT RESPONDENTS' SPECIAL MOTION TO STRIKE

Respondents claim that Appellant must "plead and prove" his case in order to defeat their anti-SLAPP motion. (RB 8.) This argument is incorrect as a matter of law. An anti-SLAPP motion is not a mini-trial on the merits. "[T]he anti-SLAPP statute requires only a 'minimum level of legal sufficiency and triability . . .'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738.) The standard employed by courts in evaluating anti-SLAPP motions is similar to motions for nonsuit, directed

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[7] Respondents claim Appellant does not allege any specific statement by Lagrosa in his claims (RB 4), but the same article containing Romer's defamatory statements also contained statements by Lagrosa: that "the events of the past weeks have highlighted the need to bring in a new team in July that will be at the school for the long haul," and "Consistency in leadership is needed to move this school forward." (CT 47.) These comments came on the heels of Romer's comments in the article and had the same defamatory effect.

verdict, or summary judgment, but it is not the same.[8]

"**A motion to strike under section 425.16 is not a substitute for a motion for a demurrer or summary judgment**. [Citation]. In resisting such a motion, the plaintiff need not produce evidence that he or she can recover on every possible point urged. It is enough that the plaintiff demonstrates that the suit is viable, so that the court should deny the special motion to strike and allow the case to go forward." (*Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 905.) (Emphasis added.)

Showing that the suit is "viable" is not as "heavy" a burden as Respondents suggest. (RB 8.) Appellant need only have stated and substantiated a legally sufficient claim. "An anti-SLAPP-suit motion is not a vehicle for testing the strength of a plaintiff's case, or the ability of a plaintiff, so early in the proceedings, to produce evidence supporting each theory of damages asserted in connection with the plaintiff's claims. It is a vehicle for determining whether a plaintiff, **through a showing of minimal merit, has stated and substantiated a legally sufficient claim**.

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[8] To the extent that the two motions are similar, Appellant notes that motions for summary judgment or summary adjudication may be denied where, as here, "[i]f it appears from the affidavits submitted in opposition... that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented..." (*Code Civ. Proc.* § 437c(h).) Appellant has been precluded from conducting discovery on these two causes of action, and under summary judgment standards, a motion such as Respondents' should be denied.

[Citations]" (*Wilbanks,* 121 Cal. App. 4th at p. 906.) (Emphasis added.)

Therefore, all Appellant need demonstrate under the **"minimal merit"** standard is that he has stated and substantiated his claims of invasion of privacy and defamation. Disputes of material fact, where they exist or are alleged to exist, must be construed in favor Appellant, as Defendants' contrary evidence or assertions have no bearing on the success of an anti-SLAPP motion. "[I]n order to defeat an anti-SLAPP motion the plaintiff needs to submit only enough admissible evidence to show that he has a probability of prevailing on his claims. A probability of prevailing is established if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff." (*Siam v. Kizilbash* (2005) 130 Cal. App. 4th 1563, 1581.)

As explained below, Appellant has shown that facts and admissible evidence exist to support the allegations contained in the First and Sixth causes of causes of action. Appellant has, at the very least, met his burden of establishing a prima facie case for both invasion of privacy and defamation. In making the anti-SLAPP motion, Respondents have "fall[en] prey . . . to the fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense." (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 93.) Respondents must not be permitted to use the anti-SLAPP statute to avoid

the consequences of their wrongful conduct, and the order granting Respondents' special motion to strike must be reversed.

II. THE ANTI-SLAPP STATUTE DOES NOT APPLY TO THIS CASE

A. Appellant's Retirement Plans And Details of Alleged Adverse Action Taken Against Him Were Not Matters Of Public Interest.

Respondents mistakenly assume, as they do throughout their brief, that the events at Jefferson transformed every detail of Appellant's private life into matters of public interest and that Romer was free to disclose such information to the press. This assumption is false and unsupported by the record or legal authority.

Respondents incorrectly apply the three part "public interest" test established in *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913. *Rivero* defined three categories of "public interest" as (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) the statement or activity precipitating the claim involved a topic of widespread public interest. (105 Cal.App.4th at p. 924.)

1. Appellant Was Not "In The Public Eye".

With regard to the first element, Appellant was not a person in the public eye. The issue of "school violence" at Jefferson High and the Los Angeles Unified School District were in the public eye, not Appellant.

It is well settled that "the focus of the anti-SLAPP statute must be on the specific nature of the speech rather than on generalities that might be abstracted from it." (*Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 601.)

In *Consumer Justice,* the court held that false advertising claims made on behalf of an herbal supplement did not qualify as a public issue or an issue of public interest about "herbal supplements in general," because the speech was about "the specific properties and efficacy of a particular product." (*Id.* at 600-603.)

Like *Consumer Justice*, Romer's comments did not involve a public issue or an issue of public interest because his comments were not about "school violence in general," but specifically about Appellant. The confidential details of an employment action, and an employee's retirement plans, have nothing to do with the society-wide problem of school violence.

Appellant may have been quoted as to the impact the violence had on his school (SCT 3, 6-7, 8), but the focus of the media attention was never on Appellant's retirement plans or any details behind his pending removal.

There was never a *Los Angeles Times* article concerning these issues, or any indication that Appellant "thrust himself into the limelight." (*See* Section III.B.2, *infra.*) Rather, Appellant only spoke to the press when told to do so by his superiors, who directed him to do so several times. (RJN Ex.2, p.9, ll.13-17.)

There was no media attention directed at Appellant until Romer forced the attention there by making defamatory statements. (CT 46.) The fact that Appellant was in the public eye after Romer's statements does not mean that the statements concerned a topic in the public eye. "A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (*Rivero*, *supra*, 105 Cal.App. 4th at p. 926.) Further, "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132, *citing Hutchinson v. Proxmire* (1979) 443 U.S. 111, 135.)

2. The Subject of Romer's Comments Did Not Affect Large Numbers Of People

Respondents also misapply the second prong of the *Rivero* test. Respondents have failed to demonstrate how the retirement plans of a mid-level school administrator can affect thousands of people, or how details of a personnel decision could do the same. (CT 11.) *Consumer Justice*, *supra*,

indicates that the focus of anti-SLAPP analysis should be specific to the nature of the comments themselves. (107 Cal.App.4th at 601.)

These issues, specific to Appellant alone, had no bearing or connection to the issue of violence at Jefferson or the society-wide debate about school violence. At most, the comments affected the limited, definable portion of the public who were directly involved with Jefferson, such as students, parents, teachers or staff. Respondents admit as much on page 44 of their brief, wherein they state that Romer's comments were meant to inform the "Jefferson High community" when he made the statements.

3. Appellant's Personnel Information Was Not A Matter Of Widespread Public Interest

There was no "widespread public interest" in Appellant's retirement plans or the private details behind a personnel action that LAUSD had allegedly taken. The public was not aware of these issues until Romer made them an issue on the front page of the *Los Angeles Times.* Under Respondents' version of the facts, details about Appellant were no longer relevant to the "public issue" of violence at Jefferson since Appellant was no longer principal when the statements were made.

Respondents miss the crucial distinction between a topic or event which may be of public interest and the related confidential information that

is not. Appellant explained this distinction in citing *Braun v. The Chronicle Publishing Company* (1997) 52 Cal.App.4th 1036, 1048-1049 in his Opening Brief. (AOB 27-29.) Under *Braun,* the subject or topic of removing a principal may be a matter of public interest, but the confidential information behind such a removal is not.[9]

Here, Respondents fail to distinguish the fact that Appellant was removed from the confidential facts surrounding his removal. The alleged reasons LAUSD relied upon in taking an adverse personnel action against him were not related to school violence.

Appellant's retirement plans were likewise unrelated to school violence. According to Romer, Appellant's retirement plans "did not fit with the District's needs," (CT 46) and were part of the reason he was replaced as principal of Jefferson. Respondents are unable to demonstrate that Appellant's retirement plans could impact "what the District was going to do about the series of violent disturbances at Jefferson High." (RB 9.)

The student violence at Jefferson was a matter of public interest, not the personnel information of an employee who had been removed as

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[9] As explained on pages 15-25 of the AOB and in Section III.A.1, *infra*, numerous California and federal authorities protect the right of privacy in personnel matters, like the details of adverse employment action or retirement plans. Such personnel matters are part of an employee's personnel file. The privacy of personnel information in personnel files is protected by the California Public Records Act. (*Gov. Code* § 6250, et seq.)

principal. Appellant's retirement plans, and the alleged reasons relied on by LAUSD in taking a personnel action against him were matters which were private, confidential, and protected by law. Romer should not have disclosed these matters to the press.

4. "Incidental" Relation Does Not Transform Private Matters Into Matters Of Public Interest

Respondents concede that the violence at Jefferson only touched "incidentally" upon Appellant's performance, retirement plans, and removal. (RB 17.) Appellant agrees with this statement, as it shows that the details of Appellant's removal and his retirement plans were not topics of public discussion when Romer made the statements. (CT 345). "Incidental" relation between a matter of public interest and a matter that is not public interest do not make both issues matters of public interest.

Romer's publication of Appellant's personal retirement plans and LAUD's alleged "decision" to replace him unrelated to the issue of school violence. The statements did not contribute to Romer's right to *participate* in discussing the "public issue" of school violence, and therefore were not matters of public interest. (*See* AOB 32-33, discussing holding of *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107.)

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5. Code of Civil Procedure 425.16(e)(3) Does Not Apply.

In light of the above and the discussion in Appellant's Opening Brief (AOB 23-25), Romer's statements are not afforded the protections of Code of Civil Procedure section 425.16(e)(3). The comments did not involve a matter of public interest.

B. The Brown Act Protects Personnel Matters

Respondents disingenuously attempt to view Appellant's arguments concerning the Brown Act in a vacuum. The Brown Act, as with every other law, must be viewed from within the statutory framework of which it is a part. The fundamental purpose of the personnel exception to the Brown Act (*Gov. Code* § 54957) is to protect public employees from humiliating and embarrassing situations like those that occurred in this case. (*See* AOB 17-19; *San Diego Union v. City Council of the City of San Diego* (1983) 146 Cal.App.3d 947, 955.) Section 54957 is part of a larger public policy and body of law with the same goals of protecting an individual's right to privacy in information that may be personal, humiliating or embarrassing if made public. (*Cal. Const.,* Art. 1, § 1; *Gov. Code* § 6254.)

Contrary to Respondents' assertions, there *are* restrictions on what information an employer can reveal about employees. The California Public Records Act ("CPRA") prevents employers from disclosing "[p]ersonnel, medical, or similar files, the disclosure of which would

constitute an unwarranted invasion of personal privacy." (*Gov. Code* § 6254(c).) If there were no protections of such personal, confidential information, employers could freely reveal any information about any employee at any time, whenever the employer could invent some kind of "emergency" situation. (RB 28.) Romer's unilateral publication of the private details behind Appellant's removal and Appellant's retirement plans damaged Appellant's professional and private life.

Respondents' reliance on *Leventhal v. Vista Unified School District* (S.D. Cal. 1997) 973 F.Supp. 951 is misplaced. *Leventhal* does not apply to public employers. Respondents would use *Leventhal* to justify public employers' use of confidential personnel information to publicly criticize employees, which is prohibited by law.

Respondents fail to recognize that there was no public "debate" about Appellant's personal, private retirement plans, or about the private details of an employment action that had allegedly been taken against him. These issues were not an issue of public debate, and were in no way connected to violence at LAUSD schools.

Contrary to Respondents' mischaracterization, Appellant is not asking this court to adopt a "content-based restriction on the ability of district leaders to engage in uninhibited communication." (RB 17.) Appellant is simply requesting this Court to enforce the long-standing law

and public policy protecting the right of privacy in confidential personnel information.

C. Romer's Statements Were Not Based On An Act Taken In Furtherance Of His Right Of Petition Or Free Speech

Appellant's citation to *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951 is not misleading. While *Garcetti* did occur in the context of public employee discipline for statements made pursuant to official duties, the case stands for the proposition that the speech rights of individuals acting "pursuant to official duties" while on the job are substantially different than those individuals who are speaking as ordinary citizens.

Respondents assert that Romer was "acting pursuant to official duties" when he made the defamatory statements about Appellant (RB 28). Had LAUSD disciplined Romer for his statements concerning Appellant, Romer would have been precluded from asserting a violation of his First Amendment rights, because *Garcetti* holds that Romer did not speak as a citizen for First Amendment purposes. He spoke as an employee of LAUSD and his speech rights were limited.[10]

Moreover, section 425.16 requires that challenged causes of action

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[10] Although a district superintendent may occasionally be referred to as a "public officer," the correct legal characterization of his status is that of "employee." (*See Main v. Claremont Unified School Dist.* (1958) 161 Cal. App. 2d 189, 197.) Thus, *Garcetti* would apply to Romer's speech.

be those against a "person" arising from acts in furtherance of that "person's" right of petition or free speech under the First Amendment. (Code Civ. Proc. § 425.16(b).) Since *Garcetti* plainly holds that individuals do not speak as "citizens," i.e. "persons" for First Amendment purposes when acting pursuant to their official duties, the protections of section 425.16 cannot apply to Romer's statements.

Garcetti also recognizes that "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." (*Garcetti*, 126 S. Ct. at 958.) Such liberty interest bars Romer from publicly disclosing stigmatizing information regarding Appellant's performance to the public. As discussed on pages 21-22 of the AOB, Romer's comments injured Appellant's constitutionally based liberty interest in his good name. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 573.) Respondents admitted that Romer's statements "incidentally" impacted Appellant's rights. (RB 17.)

Respondents' attempt to distinguish *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107 also fails. Respondents correctly point out that the anti-SLAPP statute is inapplicable to cases "where the issue is not of interest to the public at large." (*Id.* at 119.) As demonstrated throughout this brief, Appellant's

personal retirement plans, and the details of his removal, were not of interest to the public at large. Respondents cannot justify Romer's act of revealing confidential information about an employee who had already been replaced by LAUSD. Like *Du Charme,* the alleged decision was already a *fait accompli* and its propriety was no longer at issue. To grant protection to mere informational statements here, as in *Du Charme,* "would in no way further the statute's purpose of encouraging participation in matters of public significance [citation]." (*Id.* at p. 118.) *Du Charme* is dispositive and this Court should apply its holding here.

D. Romer's Statements Were Made In Violation Of Law

The evidence in this case "conclusively establishes" that Romer's statements were made in violation of law and public policy. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.) Contrary to Respondents' assertions, pages 33-40 of the AOB constitute more than "Socratic musings" (RB 21) - the discussion therein reveals that Respondents cannot avoid application of the holdings in *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1366, and *Flatley*.

In *Paul,* the court concluded that the anti-SLAPP statutes only "protect a defendant 'from a retaliatory action for his or her exercise of **legitimate**... rights.'" (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1366.) (Emphasis in original.) Here, Romer's alleged exercise of

free speech rights was demonstrably **illegitimate**, as explained throughout the AOB and in Sections II and III of this brief. Under *Paul*, the anti-SLAPP statute should not apply. Moreover, it is irrelevant that Respondents simply "concede no illegality" and "believe that the evidence conclusively establishes" their case. (RB 19.) If this Court finds that Romer's statements were illegitimate as a matter of law, the anti-SLAPP statute should not apply. (*Flatley , supra,* 39 Cal.4th at 320.)

Appellant agrees with Respondents' conclusion that the rule of *Flatley* is only applicable to extreme or severe situations. This case is an extreme, severe situation to which *Flatley* is applicable. Appellant has established that Romer severely compromised Appellant's privacy interests by making the statements, that he damaged Appellant's personal reputation, and that he caused Appellant humiliation, embarrassment, and personal distress in the community.

III. THE FIRST AND SIXTH CAUSES OF ACTION HAVE AT LEAST MINIMAL MERIT.

A. Appellant Met The Minimal Merit Standard With Respect To The First Cause Of Action For Invasion Of Privacy.

Respondents ignore Section II.A. of the AOB while arguing that Appellant's invasion of privacy claim is "unsupported by case law or statute, and defies public policy and common sense." (RB 23.) Section

II.A. of Appellant's opening brief specifically discusses case law and constitutional authority which establish the elements of a cause of action for invasion of the right to privacy guaranteed by the California Constitution (Art. 1, § 1; the "privacy amendment").

The California Supreme Court's opinion in *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1, established the elements of a cause of action for invasion of privacy under Article I, Section 1 of the California constitution. (*Id* at p. 32.) The constitutional invasion of privacy cause of action is separate and distinct from common law, federal law or other claims for invasion of privacy. (*Id.*) Pursuant to *Hill,* a plaintiff must show: (1) A legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) a serious invasion of the privacy interest. (*Id.* at 35-37.)

In explaining these three factors, the court stated that one class of legally protected privacy interest is informational privacy, or the right to preclude dissemination of personal, confidential information. (*Id.* at 35.)

Appellant has demonstrated that each of these elements has been met in this case, and has offered evidence in support thereof. The trial court erroneously held, as a matter of law, that some kind of "public concern" element impacted its decision to strike the cause of action for invasion of privacy. (CT 357-358.) This is not a proper consideration under the three elements established in *Hill.* California's constitutional right to privacy

under Article I, Section 1 is "an inalienable right which may not be violated by anyone." (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 82.) Appellant's cause of action for invasion of privacy has at least minimal merit and the trial court order dismissing it should be reversed. (*Wilbanks, supra*, 121 Cal.App.4th at p. 906.)

1. Appellant Had A Legally Protected Privacy Interest.

Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. (*Hill*, 7 Cal.4th at 40.) As discussed in Sections I.A. and II.A. of the Opening Brief (AOB 15-23, 45), Appellant has established that he has legally protected privacy interests under five distinct theories:

(1) the California Constitution (Art. 1, § 1) ["Informational privacy is the core value furthered by the Privacy Initiative. [Citation]. A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." (*Hill, supra*, 7 Cal.4th at 35)];

(2) the Brown Act (*Gov. Code* § 54950 et seq.), [The underlying purpose of the personnel exception [§ 54957] is to protect public employees from public embarrassment and to permit free and candid discussions of personnel matters in closed sessions of a local

government body. (*San Diego Union v. City Council of the City of San Diego* (1983)146 Cal.App.3d 947, 955.)]

(3) the California Public Records Act (*Gov. Code* § 6250 et seq., "CPRA") ["[O]ne class of legally protected privacy interest [under the CPRA] is informational privacy, or the right to preclude dissemination of personal, confidential information." (*Teamsters Local 856 v. Priceless, LLC* (2004) 112 Cal.App.4th 1500, 1514.);

(4) LAUSD's collective bargaining agreement ("CBA") with the Associated Administrators of Los Angeles ("AALA") [the CBA is the exclusive mechanism for evaluating the performance of and disciplining the certificated supervisory unit, which includes Appellant. (CT 2, ¶ 7, ll.22-26.)]; and

(5) decisional law. (*See* AOB at 15-23, 45.)

The foregoing sources operate coextensively to protect Appellant's privacy rights, including personnel information. Under the reasoning of *Hill, supra,* social norms clearly recognize the need to maximize individual control over information concerning retirement plans, job performance, and alleged reasons for removal from a job, to prevent "unjustified embarrassment or indignity" over their dissemination or misuse. (*Hill, supra*, 7 Cal.4th at 35.) Here, the information was disseminated and misused to humiliate and embarrass Appellant. This information is

protected by Appellant's privacy interests and he must be permitted to bring a cause of action for Respondents' violation of those interests.

Moreover, the information revealed by Romer's comments, such as the private details of the personnel decision removing Appellant, is characteristic of information found in employee personnel files. (*BRV v. Superior Court* (2006) 143 Cal.App.4th 742.) Appellant's retirement plans and alleged reasons for termination or removal from employment are undoubtedly included in Appellant's personnel file at LAUSD.

As discussed in the AOB, pages 19-21, the CPRA recognizes a strong privacy right in information contained in personnel files.[11] Romer's comments contained information commonly found in personnel files protected by the CPRA. "A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the record keeping activities of public employers and agencies." (*Teamsters*, *supra*, 112 Cal.App.4th at p. 1515.) Appellant must be permitted to bring a cause of action for Respondents' violation of his privacy interests under the CPRA.

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[11] Other similar information that employers are prohibited from disclosing under the CPRA includes medical information, social security numbers, addresses and telephone numbers of employees. (*See* AOB 19-21.)

2. Appellant Had A Reasonable Expectation Of Privacy.

Under the five theories recited above, Appellant had a reasonable expectation that his confidential personnel information, including personal retirement plans and unsupported allegations of poor performance, would not be disseminated to the general public by his employer.

Contrary to Respondents' assertion, the CBA is relevant in establishing that Appellant had a reasonable expectation that the kind of information in Romer's comments would not be disclosed to the public. In support of this proposition, Appellant submitted the supporting declaration of Michael O'Sullivan, president of the Associated Administrators of Los Angeles, and chief negotiator in development of the CBA. (CT 212.) Specifically, O'Sullivan's declaration stated that: (1) he was the Chief Negotiator for AALA in negotiating the CBA (CT 213, ¶ 4, ll.12-13); and (2) the CBA is the exclusive mechanism for evaluating the performance of and disciplining the certificated supervisory unit, which includes Appellant. (CT 2, ¶ 7, ll.22-26.)

Appellant was entitled to notice and an opportunity to respond pursuant to the terms of the CBA. (CT 345, ll.19-22.) Appellant had a reasonable expectation that his employer would not violate laws protecting his privacy. (*See* AOB 17-21.) Romer's statements violated Appellant's reasonable expectation that this information would not be disclosed.

3. Appellant's Privacy Rights Were Severely Invaded

When Romer's statements were published in the *Los Angeles Times*, Appellant's privacy interests were severely compromised. Appellant was dragged into the spotlight and placed under the microscope of public scrutiny. The focus of the public debate changed from the society-wide issue of school violence to the performance of a high school administrator and his personal retirement plans.

Romer's statements violated the privacy rights established by both California and federal law, as discussed in Section II.A.1 and II.A.2 above, and pages 15-40 of the AOB. Respondents must be held responsible for the violation of these inalienable rights.

B. Appellant Met The Minimal Merit Standard With Respect To The Sixth Cause Of Action For Defamation.

Respondents seek to apply a higher evidentiary standard to Appellant's Sixth Cause of Action for defamation than the law requires. Appellant is not required to "prove" anything. Appellant only need demonstrate that this cause of action has "minimal merit" for the anti-SLAPP motion to be denied. (*Wilbanks, supra*, 121 Cal.App.4th at 906.) Appellant established that his case has "minimal merit" under the standards discussed below and the trial court order granting Respondents' special motion to strike should be reversed.

1. Romer's Statements Were Unprivileged As A Matter of Law.

Respondents again rely on the erroneous connection between school violence and the personal retirement plans of a school administrator in arguing that Romer's statements were privileged under Civil Code section 47. In framing this argument, Respondents attempt to force Romer's unqualified act of disclosing confidential personnel information into the box of "City Emergency" (RB 11) or "School District Emergency" (RB 28), but fail to support this allegation with any explanation. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)[12]

Respondents cite *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 501 for the proposition that the section 47 privilege applies to school districts, and that the privilege applies to executive officers like Romer. (RB 29-30.) Recent cases have expressly limited application *Royer* to executive officers. "The [section 47] privilege, however, does not apply to all acts of a qualifying executive officer. The *Royer* decision states that the privilege

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[12] Thus, this Court should strike the portions of Respondents' brief where some sort of "emergency" is alleged as justification for Romer's statements. (*Cal. Rules of Court* R. 8.204(e).) Even if this Court does not strike the offending portions of Respondents' brief, no "emergency" existed here. Romer's comments were made on May 31, 2005, a full six days after the last disturbance at Jefferson.

applies only to communications made 'while exercising policy-making functions.' [Citation]." (*Copp v. Paxton* (1996) 45 Cal. App. 4th 829, 843, *citing Royer v. Steinberg*, *supra*, 90 Cal. App. 3d at 501.)

As explained in on pages 54-56 of the AOB, a school superintendent does not exercise a "policymaking function" for the purposes of immunity under Civil Code section 47 when communicating with a newspaper reporter about the confidential personnel information of a public employee.

Moreover, Respondents disingenuously imply that neither Romer nor Lagrosa had knowledge of the CBA, Government Code, and other authority which defined and controlled their duties and obligations as public officials. (RB 42.) Romer signed the CBA, and was aware of its contents. (CT 302.)[13] Public officials like Romer and Lagrosa must be held accountable when they violate laws and policy that govern their fiduciary obligations, like those which require them to protect the confidentiality of public employee personnel information. (AOB pp. 15-23.) The privilege of Civil Code section 47 does not apply to Romer's conduct.

i. Santavicca v. Yonkers Does Not Apply To This Case

Respondents cite *Santavicca v. City of Yonkers* (N.Y.App.Div. 1987) 132 A.D.2d 656 in attempting to justify Romer's unqualified and

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[13] Romer was the "chief executive officer" of the LAUSD school board. (RB 30.)

unsanctioned act. First, as Respondents acknowledge, the case involves New York and not California law. The opinion consists of less than three pages and there is very little analysis of the facts. *Santavicca* should be disregarded by this Court on these grounds alone.

Second, *Santavicca* is factually dissimilar and inapplicable to Appellant's case. *Santavicca* involved a high school football coach and coaching staff who violated school procedure when they permitted a student to play football without conducting a physical examination or obtaining parental consent. (*Id.* at 656.) The student subsequently died while participating in a school football game. (*Id.*) The school superintendent in *Santavicca* stated, during a press conference about the incident, that he would officially reprimand each member of the coaching staff who had not followed the required procedures in permitting students to play football. (*Id.* at 656-657.) The court dismissed the subsequent lawsuit on immunity grounds, since the superintendent acted pursuant to his authority to reprimand for violating school procedures. (*Id.* at 657.)

Unlike *Santavicca*, Respondents have failed to cite any rule, regulation or law that Appellant failed to comply with, or that he violated. (CT 345, ll.19-22.) To the contrary, Appellant has shown that he was performing his job to the best of his ability, and was achieving results from his efforts. (CT 344, ll.3-7; CT 345, ll.23-26; CT 7, ¶ 13-15.) Romer,

unlike the superintendent in *Santavicca*, had no authority to divulge the confidential details of personnel matters to the press.

In *Santavicca,* the coach's conduct in permitting the student to play football without following procedure led directly to the student's death. No such connection exists in this case. Unlike *Santavicca*, Appellant's personal retirement plans and pending removal had no impact on the student violence that occurred at Jefferson.

2. Appellant Was Not A Public Official Or Public Figure And Does Not Need To Demonstrate Malice

Under California law, Appellant was not a public official or limited purpose public figure for the purposes of defamation analysis. Respondents incorrectly imply that California law regards school principals as public officials or public figures. (RB 33.) The United States Supreme Court has made clear that not every public employee is a public official or public figure. (*Hutchinson v. Proxmire*, (1979) 443 U.S. 111, 119 n.8.)

i. Appellant Was Not A "Public Official."

California authorities have recognized that "there is disagreement among jurisdictions as to whether public school principals are to be considered public officials." (*Ghafur v. Bernstein* (2005) 131 Cal. App. 4th

1230, 1238.)[14] *Ghafur* determined that a school superintendent was a public official for the purposes of defamation law. However, the court made certain to distinguish school superintendents from other school employees. (*Id.* at 1238.)

Ghafur noted that the one case which *did* involve an educational employee, a school teacher, found that the teacher was not a public official or figure for the purposes of defamation analysis. (*Id.* at 1237, citing *Franklin v. Benevolent Etc. Order of Elks* (1979) 97 Cal. App. 3d 915, 924-925.) *Franklin* remains valid.

The reasoning in *Franklin* shows that Appellant was not a public official for purposes of defamation. "Implicit in the reasoning of *New York Times* and of *Rosenblatt* is the concept of a freedom of the *governed* to question the *governor*, of those who are influenced by the operation of government to criticize those who control the conduct of government." (*Franklin*, 97 Cal. App. 3d at 924.) (Emphasis in original.)

Here, Appellant was not questioned by anyone that he "governed" but by the very "governor" of his employment - Romer. Appellant did not

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[14] *Beeching v. Levee* (Ind. Ct. App. 2002) 764 N.E.2d 669, 677 at n.5, noted the extent of the disagreement amongst various jurisdictions. Georgia, Illinois, Ohio, South Carolina and Indiana have determined that a principal is not a public official, while Louisiana, Maryland, Massachusetts, New York, Tennessee, and Vermont have reached the opposite result. (*Id.*)

criticize the government, the government criticized him. Importantly, Romer's statements focused on private matters of retirement plans and details behind an employment decision. As discussed in Section III.B.3, *infra*, Romer spoke as Appellant's employer when making the statements. Further, Section II.A., *supra*, demonstrates that these were not matters of public concern.

Respondents correctly note that the "touchstone for public official status" is the "prominence of the position in the official hierarchy, or because of the duties of the position tend naturally to have a relatively large or dramatic impact on members of the public." (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1611.) Appellant, as a mid-level administrator, was only responsible for running the daily operations of a high school. He was one of thousands of mid-level administrators employed by LAUSD. Appellant had no power to appoint, terminate, suspend, lay off or promote employees. (CT 8.) Appellant's duties, responsibilities and terms of employment were all determined by LAUSD, Romer, and Lagrosa.

Similar to the school teacher in *Franklin, supra,* Appellant had no position to control the conduct of government as a school principal. "The governance or control of which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philo-sophical. Far too much so, in our view, to justify exposing each public

classroom teacher to a qualifiedly privileged assault upon his or her reputation." (*Franklin*, *supra*, at 924.) Appellant could only operate within the boundaries established by his superiors, and thus could have no *impact* on the public beyond what was determined by someone else. He was not, and cannot be considered a "public official" for the purposes of defamation analysis.

Other courts have applied reasoning nearly identical to that of *Franklin* in concluding that public school principals are not public officials. *McCutcheon v. Moran* (Ill.App.Ct. 1981), 99 Ill. App. 3d 421, 424, held that "The relationship a public school teacher or **principal** has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualified privileged assault upon his or her reputation." (Emphasis added.)

In *Ellerbee v. Mills* (Ga. 1992), 262 Ga. 516, 517, the Supreme Court of Georgia held, "Under normal circumstances, a principal simply does not have the relationship with government to warrant 'public official' status under *New York Times*. Principals, in general, are removed from the general conduct of government, and are not policymakers at the level intended by the *New York Times* designation of public official."

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ii. Appellant Was Not A "Public Figure."

For the same reasons that Appellant is not a "public official," for the purposes of defamation analysis, he is also not a "public figure." In *Copp v. Paxton* (1996) 45 Cal. App. 4th 829, the California Court of Appeal reviewed and applied the "public figure" standards outlined by the United States Supreme Court in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323.

Copp, supra, explained that the characterization of a plaintiff as a public figure "may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (*Id.* at 843, *citing Gertz, supra,* 418 U.S. at 351.)

Appellant did not achieve such "pervasive fame or notoriety" that he could be considered a public figure for all contexts. "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." (*Id.*) There is no evidence in this case that Appellant, as a principal of a high school in South Los Angeles, was so famous that he had a pervasive effect on the affairs of society. As explained in Section III.B.2.i above, Appellant could only operate within

the boundaries established by his superiors, and could have no real *impact* on the public beyond what was determined by someone else. He cannot be considered a "general purpose public figure" as contemplated by *Gertz.*

In evaluating whether a plaintiff is a "limited public figure," a court must first find that there was a public controversy. (*Copp, supra,* 45 Cal.App.4th at 845.) The courts must next determine that the plaintiff undertook "some voluntary act through which he seeks to influence the resolution of the public issues involved." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal. 3d 244, 254, fn. omitted.) The "courts should look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies." (*Id.* at 254-255.) "Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy." (*Waldbaum v. Fairchild Publications Inc.* (1980) 627 F.2d 1287, 1298.)[15]

Although there may have been a public controversy about school violence in this case, there was *never* a public controversy about Appellant's personal retirement plans or the alleged reasons as to why LAUSD removed him. For the purposes of "limited public figure" analysis,

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[15] Respondents' Brief and Respondents SLAPP motion itself fail to address the second two elements of the "limited purpose public figure" analysis. (CT 13 ll.7-23.) They are aware that Appellant took no voluntary act, and that Romer's comments were not germane to the issue of school violence.

Appellant was not a limited public figure.

Respondents have presented no evidence that Appellant undertook any voluntary act to "thrust" himself into the "forefront" of the public debate about school violence. Appellant was the principal of a school where violence occurred. It was by virtue of that situation that Appellant was involved in the issue of school violence. He did not voluntarily become involved in the issue. In *Wolston v. Reader's Digest Association* (1979) 443 U.S. 157, the United States Supreme Court held that a person's involuntary involvement in a matter of public interest does not make him a public figure.

Romer's comments concerning Appellant's personnel matters were not germane to Appellant's involvement in the public debate about violence at Jefferson."A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (*Rivero, supra*, 105 Cal.App. 4th at p. 926.) Further, "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Weinberg, supra,* 110 Cal.App.4th at 1132.)

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iii. Other Jurisdictions Have Concluded That School Principals Are Neither Public Officials Nor Public Figures

In *Beeching v. Levee*, *supra*, the Court of Appeals of Indiana determined that a school principal was not a "public official" nor a "public figure" for purposes of her defamation action against a teachers' union and union leader, after the union leader told teachers that principal was a "liar" and that she could not be trusted. (764 N.E.2d at 672.)

Beeching reached this conclusion because the principal was appointed rather than elected, the defamation action involved an internal work-place dispute rather than an education issue of public concern, and principal had not achieved fame or notoriety in the community. (*Id.*)

In *East Canton Educ. Ass'n v. McIntosh* (Ohio 1999) 85 Ohio St. 3d 465, the Ohio Supreme Court found that a high school principal was neither a "public official" nor a "public figure" for purposes of defamation analysis. "As a high school principal, McIntosh did not assume a role of special prominence in the affairs of society. He did not occupy a position of such persuasive power and influence that he can be deemed a public figure for all purposes as required by *Gertz*. Nor did he thrust himself to the forefront of the public controversy that may have developed concerning his termination. ... There is no evidence ... that McIntosh sought out the media to trumpet his cause. Accordingly, the trial court erred in finding that

McIntosh was a public figure and requiring that he be held to the *New York Times* standard of proving actual malice." (*Id.* at 474-475.)

The reasoning of these cases should apply here. Appellant was an employee of the LAUSD who served under a chain of command consisting of his Director, the local District Superintendent, the District Superintendent, and the Board of Education. As a principal of a high school in South Los Angeles, Appellant was far removed from the leadership of LAUSD, and hardly in a position to control the conduct of governmental affairs. He should not be considered a "public official" for the purposes of defamation analysis.

Similarly, there is no evidence that Appellant occupied a position of such persuasive power and influence that he can be deemed a public figure for all purposes as required by *Gertz*. There is also no evidence that Appellant thrust himself to the forefront of the issue of violence at Jefferson. Instead, he spoke to the media only at the direction of his supervisors. (RJN Ex.2, p.9, ll.13-17.)

Therefore, Appellant was neither a "public official," nor a "public figure" for the purposes of defamation analysis, and should not be required to prove actual malice in his cause of action for defamation.

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3. Even If Appellant Was A "Limited Purpose" Public Figure, The Evidence Supports A Defamation Cause Of Action.

Should this Court consider Appellant a "limited purpose public figure," Appellant has submitted evidence to support the defamation cause of action. Specifically, Appellant has demonstrated, that Romer's comments were defamatory and made with reckless disregard for Appellant's rights, as discussed in Section II.A.1 above.

Appellant specifically stated in his supporting declaration that Romer admitted to him that his statements to the *Los Angeles Times* were false. (RJN Exh. 2, p.7, ll.23-28.) This **admission** on the part of Romer shows that the statements were false, and that Romer acted with reckless disregard when he made the statements to the press, as he did not take the time to verify or investigate their accuracy.

Indeed, Romer's declaration in support of Respondents' motion to strike is devoid of any statement that he ever visited Jefferson, evaluated Appellant's performance, or spoke with him concerning conditions at the school. Appellant testified that Romer did not do any of these things. (CT 345, ll.19-22; RJN Ex.2, p.8, ll.1-4.)

Moreover, Romer had no reasonable grounds for believing the truth of the false statements that he made. Under Appellant's leadership, Jefferson significantly improved its academic standing. (CT 345, ll.23-28.)

Appellant never received any reports that his performance as principal was less than stellar. (CT 344, ll.3-7; CT 345, ll.19-22; RJN Ex.2, p.6, ll.22-23.)

Based on the foregoing, Appellant has at least demonstrated that his cause of action for defamation has minimal merit, and that evidence exists to support his allegations. (*Wilbanks, supra,* 121 Cal.App.4th at 906.) Appellant has a legitimate claim. The defamation cause of action was not brought "primarily to chill" Romer's legitimate free speech rights. It was brought to redress Appellant's right to be free from being subjected to false, disparaging and defamatory remarks.

4. Romer's Statements Were Statements Of Fact

A superintendent is held to a different standard from members of the public for speech purposes, because a superintendent functions as an employer when addressing or taking personnel actions against employees. Thus, when Romer discussed Appellant's retirement plans and job performance, he was not acting as an individual stating his opinion, but as an employer stating facts. Romer's statements were taken as fact by those who read the *Los Angeles Times* article containing Romer's defamatory comments. (CT 214; SCT 20, 28.)

Moreover, Romer's statements were not statements of opinion because, according to Respondents and Romer himself, Romer was acting in the pursuant to his "official duties" as Superintendent of LAUSD when

speaking to the *Los Angeles Times* reporter. (CT 87, ¶ 2.) If Romer was making an "official" statement for the District, then his statements would necessarily be those concerning what LAUSD was *actually doing or was planning to do* concerning Appellant's employment. The statements do not constitute an opinion.

"The dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion. [Citation]. The answer to that question is determined by applying the 'totality of circumstances' test – a review of the meaning of the language in context and its susceptibility to being proved true or false." (*Moyer v. Amador Valley Joint High School District* (1990) 225 Cal.App.3d 720, 724-725.)

When Romer stated that Appellant had "retirement plans that did not fit with the District's needs," (CT 88) Romer stated that the District's official position was in fact that Appellant had needs that did not fit with Appellant's retirement plans. When Romer stated that Appellant's "handling of the April and May 2005 disturbances 'accelerated' a decision to replace [Appellant]," Romer gave the official statement that LAUSD had in fact replaced Appellant because of his handling of the student violence.

The foregoing statements are provably false, since there is no evidence, and Respondents have admitted, that the Board took no action to

remove Appellant or to consider his removal. (CT 332.) There is likewise no evidence that the District ever considered removing Appellant for any reason, beyond the vague, generalized allegations that Lagrosa and Romer formed an "opinion" that Appellant should be replaced.

Further, Respondents concede that the due process protections afforded by the CBA were not provided. Romer's position that he was acting pursuant to his "official" duties when he made the statement that "stronger leadership" was needed at Jefferson meant that he gave LAUSD's official position as Appellant's employer that stronger leadership was in fact needed at Jefferson. The statement that "stronger leadership" was needed unquestionably implies that Appellant's leadership was not strong enough, i.e. inadequate. To that end, the Attorney General has pointed out that "[t]here is no question but that premature publicity concerning one's job performance may cause great and possibly unjustified damage to one's personal reputation." (59 *Op. Atty Gen. Cal.* 532 (1976).)

In *Gallant v. City of Carson* (2005) 128 Cal. App. 4th 705, plaintiff Ann Marie Gallant alleged that her supervisor told her co-workers and various community members that the she was terminated from her employment because she was incompetent. (*Id.* at 708.) The Second District held that the supervisor's statements, insofar as they alleged incompetency, were not statements of opinion. (*Id.* at 714.)

"The alleged statements--that Gallant is incompetent--are defamatory... defamatory statements are not protected if they imply an assertion of false objective fact. The statement that plaintiff 'is an incompetent [employee] ...' implies a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false. ... Since the statement implies that plaintiff is generally disqualified for [her] profession, it is defamatory if it is false. ... Consequently, the trial court erred in finding this statement was not defamatory because of being an 'opinion.'" (*Id.* at 709.)

The facts of *Gallant* fit squarely with this case. Here, Romer stated that stronger leadership was needed at Jefferson, that Appellant "had retirement plans that did not fit with the district's needs," and that Appellant's handling of the violence at Jefferson had "accelerated" a decision to replace him. (CT 46.) These statements imply that Appellant did not have adequate leadership skills and that he was incompetent. Like *Gallant,* these statements imply an assertion of false objective fact. They are defamatory, and this the trial court's order striking this cause of action under Code of Civil Procedure section 425.16 should be reversed.

None of the cases cited by Respondents deal with statements by an employer that involve criticism of job performance connected with personal retirement plans and pending removal of an employee. Such authority does

not exist, and employers are required by law and public policy to respect the privacy rights of their employees. (*See* AOB 15-23.)

Moyer, supra, involved statements that called plaintiff a "babbler" and "worst teacher," but noticeably did not involve any statements regarding pending personnel action or retirement plans. (225 Cal.App.3d at 725.) More importantly, the statements in *Moyer* were made by students in a high school newspaper article about a prank pulled during a class. (*Id.* at 722.) The false, defamatory statements in this case were made by the Superintendent of LAUSD, Appellant's supervisor and employer, to a reporter from the *Los Angeles Times.* The statements appeared the next day in an article concerning LAUSD's official position on Appellant's job performance, retirement plans, and removal. Such personnel matters are protected by law, and Romer had an affirmative obligation not to reveal them to the press. (*See* Section II.A.1, *supra.*)

IV. THIS COURT SHOULD CONSIDER APPELLANT'S SUPPORTING DECLARATIONS IN THEIR ENTIRETY

This Court should reverse the trial court's evidentiary ruling since Appellant's supporting declaration recites facts which are already an undisputed part of the record. (CT 341-347.) Respondents, not Appellant, included Appellant's responses to LAUSD's specially prepared interrogatories as an Exhibit to their reply to Appellant's opposition to the

special motion to strike. (CT 340, ll.11-12.)

At no time did Respondents object to or otherwise dispute Appellant's responses to the interrogatories. Their use of the responses as an exhibit shows they accepted the facts contained therein. Respondents should not be permitted to have those facts stricken from the record now.

Moreover, the trial court considered Appellant's responses to the interrogatories and thus considered the matters it ordered stricken from Appellant's supporting declaration.

Moreover, Appellant's supporting declarations contain admissible evidence, and the trial court ruling striking portions of Appellant's supporting declaration and the supporting declaration of Michael O'Sullivan, Ed.D should also be reversed on this ground.[16]

A. Appellant's Supporting Declarations Contain Admissible Evidence.

Contrary to Respondents' argument on page 42 of their brief, Appellant is not arguing that the court should evaluate inadmissible evidence. Appellant is arguing that the statements of fact contained in the

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[16] Even if this court determines that some parts of Appellant's supporting declarations contain inadmissible evidence, only those inadmissible portions should be stricken. This Court should separate inadmissible evidence from admissible evidence, or direct the trial court to do so.

declarations are admissible. (AOB 58, ¶ 1.)[17]

Specifically, the court sustained Respondents' objection to Appellant's statement that "Romer admitted to me that his statements to Joel Rubin of the Los Angeles Times newspaper were false." (RJN Exh. 4, p.5, ll.11-14.) Contrary to Respondents' argument, such an admission is relevant and probative of Appellant's case. Appellant does not need to "prove that Mr. Romer's statements were false when made," since the statement can be used to show that Romer acted with reckless disregard in making defamatory statements to the *Los Angeles Times*, and that the defamatory statements themselves were false. Moreover, Romer's admission is not made inadmissible by the hearsay rule, as he is a party to this action. (*Evid. Code* § 1221.) This Court should consider this evidence in evaluating the merits of Appellant's case and whether Romer's statements fell under section 425.16.

Respondents' objections to Appellant's statement that "Romer's statement that stronger leadership was needed at Jefferson High School was a personal criticism of my competence and character" are meritless. (RJN Exh. 4, p.4, ll.11-16.) Appellant, as the subject of the statements, certainly

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[17] If this Court determines that some evidence *not* objected to by Respondents is inadmissible, it should still consider that evidence. (*See Gallagher v. Connell* (2004) 123 Cal. App. 4th 1260, 1264.)

has personal knowledge of the actual impact the statements had on him. In fact, there is no better source for this information. Moreover, Romer's statements were not written, and Appellant's statement under oath is not "improper testimony as to content of writing." The trial court should not have sustained these objections.

Respondents' objections to Appellant's statement that "The CBA does not authorize LAUSD or members of AALA, including myself, to comment on personnel matters" are without merit. (RJN Exh. 4, p.4, ll.7-11.) As a member of the bargaining unit with LAUSD, Appellant has personal knowledge of the rights and responsibilities that the CBA imposes on him and other parties to the agreement. His statements on such matters are relevant and admissible.

Similarly, the trial court erroneously sustained Respondents' objection to Appellant's statement that Romer and Lagrosa "had never observed my performance and had not received any reports that my performance was less than stellar." (RJN Ex.2, p.6, ll.22-24.) Appellant, by virtue of the CBA and statutory law providing due process for public employees, would have been entitled to notice and an opportunity to respond had either Romer or Lagrosa received a report of deficient performance. Appellant was also entitled to know if such reports existed. His declaration that there were no such reports is admissible.

B. Respondents' "Statement of the Case" Contains Factual Inaccuracies

Respondents' "Statement of the Case" does little more than cite newspaper articles and repeat Lagrosa's inaccurate and disputed testimony about the facts of this case.[18] Pages four and five of Respondents' Brief almost exclusively cite the declaration of Lagrosa in stating the facts of this case. Appellant has disputed Lagrosa's "facts" and offered evidence to the contrary.

Specifically, Respondents allege that Appellant "declared his intent to resign." (RB 4.) This statement is false. Appellant never declared his intent to resign. Appellant only began researching retirement issues in early 2005 after he learned that he was slated for removal in December 2004. (CT 346, ll.18-22; CT 347, ll.1-4; RJN Exh.2, p.6, ll.1-5.) This was reinforced by the District's failure to conduct a "Stull" evaluation of Appellant, which was a sign that an administrator would be removed.

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[18] Appellant again urges this court to consider Lagrosa's interview on a radio program entitled "Talk of the City," aired on June 17, 2005, on radio station 89.3 KPCC FM in Los Angeles, California. The interview contains statements by Lagrosa that contradict her declaration supporting Respondents' special motion to strike. Respondents rely heavily on false statements in Lagrosa's declaration in establishing their case. (*See* Appellant's Request for Judicial Notice, filed with this Court on December 18, 2006.) Respondents must not be permitted to fabricate facts and events for the sole purpose of discrediting Morrow's claims against them.

(CT 346, ll.23-26; RJN Exh.2, p.6, ll.7-9.)[19] Appellant knew that he was slated for removal *before* the events at Jefferson in April and May 2005.

Moreover, Appellant never "met with" Lagrosa to discuss his future plans. (RB 4.) The first time Appellant spoke with Lagrosa regarding his retirement was on May 31, 2005, when Lagrosa was speaking on her cell phone. (RJN Exh.2, p.6, 11.25-28.) Appellant did not tell Lagrosa that "it was true that he was planning to retire from the District." (RB 5.) Rather, Appellant stated that he was aware that Lagrosa wanted to replace him. (RJN Exh.2, p.7, ll.2-4.) Contrary to Respondents' assertions, Lagrosa, and not Appellant, stated that she wanted a new team in place in July 2005. (RB 5; RJN Exh.2, p.7, ll.11-14.) Appellant did not discuss finances or salary with Lagrosa, as their exchange was very short. (RJN Exh.2, p.7, ll.15-16.)

Respondents make claims that are unsupported by the record:

1. Appellant only devoted two paragraphs of the AOB to support his invasion of privacy claim. (RB 23, n.8.) This statement is misleading, and ignores pages 15-23 of the AOB, which are devoted to explaining the violation of Appellant's privacy rights under five distinct theories.

2. Appellant argued that the trial court struck portions of his supporting

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[19] Line 23 on CT 346 and Line 6 on page 6 of Appellant's supporting declaration was intended to read, "Beginning in **2005**..."

Declarations on the ground that it was not signed and/or timely. (RB 41, n.15.) This is false. Section III.C. is a response to Respondents' claims that they were somehow prejudiced by the manner in which Appellant's supporting declaration was signed and served, or that the declaration should not be considered on this ground. (*See* RJN Exh.4, p.2, ll.16-24.)

3. Appellant "contended that Governor Romer could read the minds of thousands of LAUSD employees." (RB 41-42.) This language appears nowhere in any pleading submitted by Appellant, and is obviously a failed attempt at sarcasm.

4. Appellant "imputed to Respondents Romer and Lagrosa... intimate knowledge of the California Government Code." (RB 42.) This allegation is untrue. Respondents' opinion of the evidence presented by Appellant is irrelevant. Respondents' argument implies that neither Romer nor Lagrosa were responsible for their failure to abide by the laws that govern their duties as public officials.

V. RESPONDENTS ARE NOT ENTITLED TO ATTORNEY FEES AND COSTS

Upon reversal of the trial court order granting Respondents' special motion to strike, Respondents will no longer be the 'prevailing defendant'

and the trial court order granting attorney fees must be set aside.[20] Code of Civil Procedure section 425.16(c) provides that fees are only available to "prevailing" defendants.

Endres v. Moran (2006) 135 Cal.App.4th 952, held that defendants who were successful in striking only one cause of action were not "prevailing" parties under the anti-SLAPP statute. (*Id.* at 955-956.) Where the results of an anti-SLAPP motion are 'minimal' or 'insignificant' a defendant is not always the prevailing party. (*Id.* at p. 957.) If this Court reverses the trial court order with respect to only one of the causes of action, it should also set aside the order granting attorney fees to Respondents since the results of the motion would then be minimal and insignificant.[21]

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[20] Should this Court reverse the trial court orders, Appellant respectfully requests that Respondents be ordered to pay his attorney fees and costs incurred in connection with this appeal, pursuant to California Rules of Court Rule 8.276.

[21] This Court should at least remand the issue back to the trial court for a redetermination of fees, if only one cause of action is reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the order granting Respondents' Special Motion to Strike Appellant's First and Sixth Causes of Action under Code of Civil Procedure section 425.16, and direct the Superior Court to issue an order denying the motion in its entirety. Appellant further requests that this Court set aside the Superior Court order awarding attorney fees to Respondents, and grant fees and costs to Appellant in prosecuting this appeal as the prevailing party, and for such other and further relief as this Court may order.

Dated: February 6, 2007

Respectfully submitted,
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 10,933 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this brief.

Dated: February 6, 2007

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